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12
13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA

15 JOHN V. FERRIS and JOANN M. FERRIS,
16 Individually and on Behalf of All Others
Similarly Situated,

17 Plaintiffs,

18 v.

19 WYNN RESORTS LIMITED, STEPHEN A.
20 WYNN, CRAIG SCOTT BILLINGS,
STEPHEN COOTEY, MATTHEW O.
MADDOX, JOHN J. HAGENBUCH,
ROBERT J. MILLER, PATRICIA
MULROY, CLARK T. RANDT JR., ALVIN
V. SHOEMAKER, KIMMARIE SINATRA,
DANIEL B. WAYSON, JAY L. JOHNSON,
RAY R. IRANI, and J. EDWARD VIRTUE,

24 Defendants.

25 Case No. 2:18-CV-00479-GMN-CWH

26 CLASS ACTION

27 **DEFENDANT STEPHEN A. WYNN'S
MOTION TO DISMISS THE SECOND
AMENDED CLASS ACTION
COMPLAINT**

28 **ORAL ARGUMENT REQUESTED**

NOTICE OF MOTION TO DISMISS

Defendant Stephen A. Wynn (“Mr. Wynn”) hereby moves to dismiss the Second Amended Class Action Complaint (ECF No. 122) filed against him by Lead Plaintiffs John V. Ferris and JoAnn M. Ferris, and named Plaintiff Jeffrey Larsen, individually and on behalf of all others similarly situated (“Plaintiffs”).

6 The Second Amended Complaint fails to state a claim and thus should be dismissed
7 pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), and the Private Securities
8 Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u-4(b). Mr. Wynn also moves to dismiss the
9 Second Amended Complaint on the additional ground that it fails to state particularized facts
10 sufficient to establish falsity or a strong inference of scienter. This motion to dismiss is based
11 upon this notice, the accompanying memorandum of points and authorities, together with all
12 accompanying documents and exhibits, and such oral argument or other materials as may be
13 presented in connection with the hearing of this matter.

14 | Dated: August 18, 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION & BACKGROUND

The Second Amended Complaint in this case may be longer than the prior complaints, but the allegations it contains are not new. Plaintiffs fundamentally seek to recover for losses they claim to have suffered as result of a brief decline in the Wynn Resorts stock price after the release of a media article in late January 2018, in the early stages of the #metoo movement, reporting *allegations* of sexual misconduct by Mr. Wynn (“the media article”). While Mr. Wynn denied—and continues to deny—the accuracy of any of those allegations, at the time, Mr. Wynn made the decision to resign as CEO of Wynn Resorts so that the company he created could continue its success, and in order to ensure that Wynn Resorts’ shareholders would not suffer from the distraction allegations of this nature might cause. Following Mr. Wynn’s resignation, Wynn Resorts’ stock price dropped, closing at \$164.16 at the end of the class period. Second Am. Compl., ECF No. 122 (“SAC”) ¶¶ 6, 10. But, three months later on May 10, 2018, shares bounced back to \$201.51 per share—worth more than before the media article and Mr. Wynn’s resignation, when the stock had traded at \$200.60. ECF No. 82-3, Ex. 26 (Stock Chart) at 3-4.

Just as before, Plaintiffs' allegations are not sufficient to state a claim for securities fraud. Plaintiffs fundamentally assert that statements about the Wynn Resorts Code of Conduct, its business operations, and its regulatory environment were false because Mr. Wynn and others failed to disclose personal settlements he entered in 2005 and 2006 resolving *unsubstantiated allegations* of personal misconduct, and that he engaged in a pattern of misconduct that led to additional claims in early 2018. These assertions do not meet the heightened pleading requirements of the PSLRA. As this Court previously found, the vast majority of the statements Plaintiffs challenge—including the handful made directly by Mr. Wynn—are aspirational statements that amount to non-actionable puffery. ECF No. 119 (May 27, 2020 Dismissal Order) at 35. Even if these statements were actionable, the federal securities laws do not impose a general duty to disclose unproven claims or allegations of corporate mismanagement. As this Court also previously concluded, none of the challenged statements suggest anything about Mr. Wynn's personal conduct that would give rise to any independent duty to disclose his personal

1 settlements. *Id.* at 34. And while Plaintiffs rely heavily on the findings of state gaming
 2 regulators—specifically, the Nevada Gaming Commission (“NGC”), Nevada Gaming Control
 3 Board (“NGCB”), and the Massachusetts Gaming Commission (“MGC”—*those regulatory*
 4 *bodies did not evaluate or reach any conclusions regarding whether any of the allegations of*
 5 *misconduct were true. E.g.*, ECF No. 97-7 (MGC Decision and Order) at 1 (confirming that “[a]t
 6 *no time was it our obligation to assess the truth of the allegations that give rise to this matter”).*
 7 Plaintiffs’ claims once again fail on falsity alone.

8 Plaintiffs’ complaint fails for the additional and independent reason that they have not
 9 pled facts supporting the necessary strong inference of scienter—a state of mind tantamount to
 10 intent or conscious action *to commit securities fraud*. Knowledge of unproven and contested
 11 accusations such as is the case here are not “facts sufficient to establish a strong inference of
 12 scienter” under the demanding pleading requirements of Federal Rule of Civil Procedure 9(b)
 13 and the PSLRA. *In re Apollo Grp., Inc. Sec. Litig.*, 2011 WL 5101787, at *10 n.5 (D. Ariz. Oct.
 14 27, 2011) (internal quotations omitted); *accord Youngers v. Virtus Inv. Partners Inc.*, 195 F.
 15 Supp. 3d 499, 519 (S.D.N.Y. 2016) (dismissing Section 10(b) claims where “news articles only
 16 provided [defendants] . . . with knowledge of accusations, not with facts contradictory to their
 17 statements”) (emphasis in original). And here, Plaintiffs offer no allegations that Mr. Wynn sold
 18 stock at any point during the class period or otherwise profited from purported fraud. The more
 19 logical inference is that Mr. Wynn sought to avoid the distraction of litigation involving serious
 20 allegations against him by resolving those claims in 2005 and 2006—at precisely the time Wynn
 21 Resorts was opening Wynn Las Vegas and Wynn Macau—so that he could focus on the task of
 22 launching those properties and building value for Wynn Resorts shareholders.

23 Despite multiple attempts, Plaintiffs have not come close to satisfying the PSLRA’s
 24 stringent pleading standards for falsity, scienter, and loss causation. The claims against Mr.
 25 Wynn should be dismissed.

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1 **II. ARGUMENT**

2 **A. Plaintiffs' Allegations Still Do Not Meet the PSLRA's Heightened Pleading
3 Standards for False Statements or Omissions**

4 As discussed in the motion to dismiss filed by Wynn Resorts and Individual Defendants,
5 Plaintiffs' Second Amended Complaint does not add any materially new allegations and does not
6 correct the pleading deficiencies that this Court correctly held supported dismissal of the prior
7 complaint. The claims against Mr. Wynn based on these same challenged statements fail for the
8 same reasons. And while Plaintiffs identify a handful of alleged false statements made
9 individually by Mr. Wynn (SAC ¶¶ 105, 166, 197, 249, 254, 265), Plaintiffs' allegations do not
10 establish that any of these statements was in any way false or misleading.

11 Statements About Encore Boston. Plaintiffs challenge three statements Mr. Wynn made
12 about the company's progress toward opening the Encore in Boston Harbor, asserting that these
13 statements were somehow rendered false by personal allegations against Mr. Wynn. SAC
14 ¶¶ 166, 249, 254. But as the Court previously held, statements such as these that do not contain
15 "any reference to Defendant Wynn or his alleged sexual misconduct." ECF No. 119 at 26. A
16 statement is only misleading "if it would give a reasonable investor the 'impression of a state of
17 affairs that differs in a material way from one that actually exists.'" *Id.* (citing *Retail Wholesale*
18 & Department Store Union Local 338 Retirement Fund v. Hewlett-Packard Co., 845 F.3d 1268,
19 1275 (9th Cir. 2017); *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002)
20 (same); see also *Mallen v. Alphatec Holdings, Inc.*, 861 F. Supp. 2d 1111, 1122, 1128-29 (S.D.
21 Cal. 2012), aff'd sub nom. *Fresno Cty. Employees' Ret. Ass'n v. Alphatec Holdings, Inc.*, 607 F.
22 App'x 694 (9th Cir. 2015) (finding no falsity because the plaintiffs failed to plead "inconsistent
23 contemporaneous statements or information" made by the defendants). These statements do no
24 such thing. They focus entirely on the progress and work done toward opening in
25 Massachusetts, and have nothing to do with any allegations regarding Mr. Wynn's personal
26 conduct. E.g., SAC ¶ 166 ("We worked very hard to compete for the right to operate in
27 Massachusetts. . . ."); *id.* ¶ 249 ("[T]hen we're going to open this place in Boston in two dozen
28 months, and we're going to have a case study of how a grand hotel, built in a major metropolitan

1 city, can change the neighborhood for the better. “); *id.* ¶ 254 (discussing regulatory approvals in
 2 Macau and noting that the rigorous review there was considered by Massachusetts regulators).

3 Statement About Employee Layoffs. Plaintiffs also identify a statement made by Mr.
 4 Wynn in 2015 during an earnings call observing that Wynn Resorts valued employee job security
 5 and “We don’t do layoffs.” SAC ¶ 197. Here again this statement pertaining to employee
 6 retention is both general corporate puffery and has nothing whatsoever to do with any allegations
 7 made against Mr. Wynn. *See* ECF No. 119 at 23 (statements about employee job security are
 8 mere puffery); *see also id.* at 28-29 (citing *Azar v. Yelp, Inc.*, 2018 WL 6182756, at *10 (N.D.
 9 Cal. Nov. 27, 2018) (“Where a defendant ‘said nothing about’ the subject of the alleged
 10 omission, ‘there is no duty to disclose, as [§ 10(b)] does not contain a freestanding completeness
 11 requirement.’”) (quoting *In re Yahoo! Inc. Sec. Litig.*, 2012 WL 3282819, at *9 (N.D. Cal. Aug.
 12 10, 2012), *aff’d*, 611 F. App’x 387 (9th Cir. 2015)).

13 Statement About Code of Conduct. Plaintiffs also point to one statement made by Mr.
 14 Wynn in a letter accompanying the Wynn Resorts Code of Conduct issued on August 1, 2016 in
 15 which he urged company employees to “comply with the Code.” SAC ¶ 105. But as this Court
 16 has already concluded, statements such as these are “inherently aspirational,” not objectively
 17 verifiable, and do not imply that every officer, director, or employee always adheres to the
 18 standards of a code of conduct. ECF No. 119 at 23-24 (citing *Hewlett-Packard*, 845 F.3d at
 19 1276; *Andropolis v. Red Robin Gourmet Burgers, Inc.*, 505 F. Supp. 2d 662, 686 (D. Colo.
 20 2007)). And even if this statement were somehow actionable under the federal securities laws,
 21 Plaintiffs’ allegations do not establish that anything Mr. Wynn said in his letter was false.

22 Statement Denying Allegations After the Media Article. Finally, Plaintiffs challenge a
 23 statement made by Mr. Wynn *after* the publication of the media article, in which he denied the
 24 allegations of sexual misconduct leveled against him. SAC ¶ 265. Mr. Wynn’s personal denial
 25 of public accusations of misconduct is hardly the basis of a securities fraud claim. Cf. *In re*
 26 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 258 F. Supp. 3d 1037,
 27 1043 (N.D. Cal. 2017) (holding that “the federal securities laws do not require a [defendant] to
 28 accuse itself of wrongdoing”). None of those accusations has been proven true, and even the

1 state gaming regulators declined to make any findings regarding the truth or falsity of these
 2 allegations, all of which resulted in settlements that occurred *after* the Class Period. *See* ECF
 3 No. 97-7 at 1.¹

4 **B. Plaintiffs' Allegations Still Lack Sufficient Particularity and Do Not Satisfy**
 5 **the PSLRA's Heightened Pleading Standards for Scienter**

6 Even if Plaintiffs had met the mark to plead falsity (which they have not), the Second
 7 Amended Complaint still fails for the additional reason that it does not allege particularized facts
 8 supporting scienter—that is, a strong inference that the defendant acted with the required state of
 9 mind, which is akin to “intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*,
 10 425 U.S. 185, 194 & n.12 (1976). This pleading requirement is “exacting.” *Tellabs, Inc. v.*
 11 *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). In the Ninth Circuit, scienter must be
 12 alleged “in great detail, [by] facts that constitute strong circumstantial evidence of deliberately
 13 reckless or conscious misconduct.” *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 974
 14 (9th Cir. 1999). A plaintiff must plead “a highly unreasonable omission, involving not merely
 15 simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary
 16 care.” *Id.* at 976 n.5. The facts pled “must not only be particular, but also must ‘strongly imply
 17 [the defendant’s] contemporaneous knowledge that the statement was false when made.’” *In re*
 18 *Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1080, 1102 (C.D. Cal. 2003); *see also Ronconi*
 19 *v. Larkin*, 253 F.3d 423, 432 (9th Cir. 2001) (to plead scienter, “the complaint must contain
 20 allegations of specific ‘contemporaneous statements or conditions’ that demonstrate the

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¹ Plaintiffs also have not come close to demonstrating that this statement caused shareholders’ economic losses. Plaintiffs claim that it was the issuance of the media article, and its alleged revelation of the “truth,” that caused their losses. *See* SAC ¶¶ 262-270. But again, Mr. Wynn’s statements were made *after* that article was published, and after the associated stock price drop. A statement that was made after the alleged truth was revealed to the market could not have caused any alleged losses. *See In re New Century*, 588 F. Supp. 2d 1206, 1237 n.26 (C.D. Cal. 2008) (finding that the defendant “cannot be liable for losses that occurred prior to disclosures that implicated its misrepresentations”); *In re Redback Networks, Inc. Sec. Litig.*, 2007 WL 963958, at *4 (N.D. Cal. Mar. 30, 2007) (“The Court is at a loss to understand how Plaintiffs’ injury for such purchases was caused by the alleged fraud when the stock price already had fallen to \$4 . . . before the truth about the Qwest transactions were made public”).

1 intentional or the deliberately reckless false or misleading nature of the statements") (quotations
 2 omitted). Plaintiffs' allegations fail to meet this high standard.

3 **1. Mr. Wynn's Awareness of Unconfirmed Allegations Do Not Support a**
 4 **Strong Inference of Scienter**

5 While Plaintiffs seek to avoid dismissal by adding more pages to the complaint,
 6 Plaintiffs' core allegations remain the same. Specifically, Plaintiffs assert that various statements
 7 about the Wynn Resorts Code of Conduct and compliance with gaming regulations were false or
 8 misleading because "Mr. Wynn had engaged in a pattern of sexual misconduct" that was
 9 deliberately concealed from investors. *E.g.*, SAC ¶¶ 136, 140, 142, 146, 179, 181, 184, 209, 211.
 10 These allegations—like those in the prior complaint—are conclusory and far too general to
 11 support an inference of scienter. *See Plumley v. Sempra Energy*, 2018 WL 1470224, at *4 (S.D.
 12 Cal. Mar. 26, 2018) (finding no scienter where the complaint alleged a "cover-up and
 13 underreporting," but did "not contain specific factual allegations to support a strong inference" of
 14 intent or recklessness); *ScripsAmerica, Inc. v. Ironridge Glob. LLC*, 119 F. Supp. 3d 1213, 1263-
 15 64 (C.D. Cal. 2015) (rejecting argument that a purported "pattern of fraud" supports a strong
 16 inference of scienter absent "particularized allegations demonstrating a pattern of fraud"); *see also*
 17 *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1036 (9th Cir. 2002) (affirming dismissal
 18 because failure to allege specifics is "insufficient to demonstrate deliberate or conscious
 19 recklessness"); *see also* ECF No. 119 at 19 (citing *Sprewell v. Golden State Warriors*, 266 F.3d
 20 979, 988 (9th Cir. 2001)) ("The Court . . . is not required to accept as true allegations that are
 21 merely conclusory").

22 First, the alleged "pattern of sexual misconduct" identifies *allegations* of harassment or
 23 misconduct from the 1990s—long before the class period and before Wynn Resorts even existed
 24 (SAC ¶¶ 56-65, 82-85)—and allegations made (and resolved) in 2005 and 2006. *Id.* ¶¶ 71-73
 25 (2005 settlement), ¶¶ 78-79 (2006 settlement). But Plaintiffs fail to identify any alleged facts
 26 establishing that Mr. Wynn knew or even suspected that he had any duty to disclose
 27 unsubstantiated allegations regarding his personal conduct to investors, or that statements about
 28 his suitability, or about the company's compliance with law, were somehow rendered false.

1 Rather, as the Court previously found, such allegations once again tend only to establish that Mr.
 2 Wynn was “aware of the alleged misconduct and the accompanying settlement[s].” ECF No.
 3 119 at 34. The resolution of private legal claims (accompanied by no finding of wrongdoing) is
 4 not equivalent to actual knowledge that general statements made about Wynn Resorts’
 5 compliance with regulations and laws were affirmatively misleading to shareholders. *See, e.g.*,
 6 *Eshelman v. OrthoClear Holdings, Inc.*, 2008 WL 171059, at *6-7 (N.D. Cal. Jan. 18, 2008)
 7 (dismissing securities complaint where neither the “manner in which” defendant settled nor the
 8 “mere fact of the decision to settle” established scienter).

9 Indeed, there is no plausible basis to conclude that Mr. Wynn deliberately or recklessly
 10 withheld allegations from investors that he contested and *had no duty to disclose* in the first
 11 place. *See Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 758 (7th Cir. 2007) (“Accusations
 12 differ from proof; business executives are not charged with ‘knowing’ the truth of unproven
 13 assertions.”); *In re Apollo Grp., Inc. Sec. Litig.*, 2011 WL 5101787, at *10 n.5 (D. Ariz. Oct. 27,
 14 2011) (unproven and contested allegations “do not amount to ‘facts’ sufficient to establish a
 15 strong inference of scienter”); *accord ScripsAmerica*, 119 F. Supp. 3d at 1262 (“It is well settled
 16 that ‘allegations from other complaints or documents, which are unproved and are contested,
 17 may not be used to establish facts to demonstrate scienter.’”); *Kyung Cho v. UCBH Holdings,*
 18 *Inc.*, 890 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (finding that “allegations from other
 19 complaints or documents, which are unproved and are contested, may not be used to establish
 20 facts to demonstrate scienter.”). The “securities laws do not impose a general duty to disclose
 21 corporate mismanagement or uncharged criminal conduct.” *In re ITT Educ. Servs. Sec. & Deriv.*
 22 *Litig.*, 859 F. Supp. 2d 572, 579 (S.D.N.Y. 2012); *accord In re Paypal Holdings, Inc. S'holder*
 23 *Derivative Litig.*, 2018 WL 466527, at *3 (N.D. Cal. Jan. 18, 2018) (“Federal securities laws do
 24 not impose upon companies a ‘duty to disclose uncharged, unadjudicated wrongdoing.’”); *In re*
 25 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 258 F. Supp. 3d 1037,
 26 1043 (N.D. Cal. 2017) (“[T]he federal securities laws do not require a company to accuse itself
 27 of wrongdoing.”); *In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d 600, 650 (S.D.N.Y.
 28

1 2017) (“It is well established that companies do not have a duty to disclose uncharged,
 2 unadjudicated wrongdoing.”).

3 Second, Plaintiffs’ allegations rest in part on allegations of misconduct that were not even
 4 made until February 2018. SAC ¶¶ 88-95 (discussing allegations not raised until 2018).
 5 Mr. Wynn could not possibly have deliberately or recklessly concealed these allegations from
 6 investors before February 2018 because the allegations and claims did not even exist at the time
 7 of the statements Plaintiffs challenge. *See Kuyat v. BioMimetic Therapeutics, Inc.*, 747 F.3d 435,
 8 442 (6th Cir. 2014) (report “released at the end of the class period and well after the allegedly
 9 misleading statements were made” had “little bearing on what the company did or did not know
 10 at the time the allegedly misleading statements were made”).

11 **2. Mr. Wynn Had No Motive to Commit Securities Fraud**

12 Also absent from Plaintiffs’ latest complaint is any allegation that Mr. Wynn had any
 13 motive to commit securities fraud. He is not alleged to have sold a single share of Wynn Resorts
 14 stock in the offering or otherwise at any point during the class period. There are no allegations
 15 that Mr. Wynn engaged in a scheme to artificially inflate Wynn Resorts stock price to financially
 16 enrich himself. This fact strongly undermines any inference of scienter. *See, e.g., In re Rigel*
 17 *Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 884-85 (9th Cir. 2012) (finding that “because none of the
 18 defendants sold stock during the period . . . [in] which they would have benefitted from any
 19 allegedly fraudulent statements, the value of [the defendants’] stock and stock options does not
 20 support an inference of scienter”); *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d
 21 1049, 1067 (9th Cir. 2008) (holding that the absence of a change in pattern in stock sales
 22 suggested that there was no insider information from which to benefit, and failed to “raise the
 23 necessary ‘strong inference’ of scienter required by the PSLRA.”).

24 To avoid dismissal, Plaintiffs now contend for the first time that Mr. Wynn was
 25 motivated by a desire to “conceal” allegations of “deliberately unlawful behavior,” “obtain
 26 advantages in divorce proceedings,” and “continue engaging in sexual misconduct.” SAC
 27 ¶¶ 334, 372. But Plaintiffs do not explain how these general (manufactured) allegations establish
 28 motive to commit securities fraud. In fact, courts have long held that such conclusory allegations

1 of motive to conceal alleged misconduct for personal gain are not sufficient. *See In re Copper*
 2 *Mt. Sec. Litig.*, 311 F. Supp. 2d 857, 872-73 (N.D. Cal. 2004) (finding allegations of a CEO and
 3 CFO’s “desire to retain their job and prestige” insufficient to “provide a strong inference of
 4 scienter”); *see also Ash v. Powersecure Int’l, Inc.*, 2016 WL 4939306, at *4 (E.D.N.C. Sept. 14,
 5 2016), *aff’d sub nom. Maguire Fin., LP v. PowerSecure Int’l, Inc.*, 876 F.3d 541 (4th Cir. 2017)
 6 (rejecting allegations that the CEO committed securities fraud to “save face,” because “the mere
 7 ‘preservation of reputation’ does not ‘constitute a cognizable motive for fraud under the
 8 Exchange Act.’”).

9 **3. Non-Fraudulent Explanations Are More Compelling**

10 Finally, in determining whether the allegations are sufficient to support the necessary
 11 strong inference of scienter, the Court should consider “not only inferences urged by the
 12 plaintiff[s],” but also “competing inferences” and “non-culpable explanations” that are
 13 “rationally drawn from the facts alleged,” *Tellabs*, 551 U.S. at 314, including “inferences
 14 unfavorable to the plaintiffs.” *Metzler*, 540 F.3d at 1061 (quoting *Gompper v. VISX, Inc.*, 298
 15 F.3d 893, 896 (9th Cir. 2002)). The “inference of scienter must be more than merely plausible or
 16 reasonable—it must be cogent and at least as compelling as any opposing inference of
 17 nonfraudulent intent.” *Tellabs*, 551 U.S. at 314; *see also Golden Palm Investments Ltd. P’ship v.*
 18 *Azouri*, 2015 WL 3629903, at *3 (D. Nev. June 10, 2015) (dismissing complaint finding scienter
 19 allegations not as compelling as the inference of nonfraudulent intent).

20 Here, Plaintiffs ask the Court to infer that Mr. Wynn must have acted with fraudulent
 21 intent because he was aware of “allegations of sexual misconduct against him” and settlements
 22 of potential claims arising from those allegations. SAC ¶¶ 329-30. Yet even if taken as true,
 23 Plaintiffs’ allegations—which simply repeat allegations made elsewhere—confirm only that Mr.
 24 Wynn was confronted with claims that he opted to resolve through settlement. The mere
 25 existence of a settlement says nothing about whether the accusations had merit, let alone whether
 26 Mr. Wynn knew he had a duty to disclose the existence of these claims to shareholders and
 27 instead elected to stay silent. *See Glazer Capital Mgmt, L.P. v. Magistri*, 549 F.3d 736, 748 (9th
 28 Cir. 2008) (holding that a settlement agreement with the SEC did not show scienter and was “not

1 sufficient to meet the pleading requirements of the PSLRA"); *Lewis v. YRC Worldwide Inc.*,
 2 2020 WL 1493915, at *15 (N.D.N.Y. Mar. 27, 2020) ("the fact that Defendants engaged in
 3 settlement discussions with the DOJ does not trigger disclosure"). A much more plausible
 4 competing inference is that Mr. Wynn sought to resolve serious potential claims made against
 5 him in order to eliminate the distraction that allegations of that nature would necessarily entail,
 6 and so that he could continue about the business of running a successful company, Wynn
 7 Resorts. Because the nonculpable inferences are logical and compelling, Plaintiffs' theory is not
 8 sufficient to plead a strong inference of scienter. *See Metzler*, 540 F.3d at 1064-65 (a court is
 9 "not required to indulge unwarranted inferences in order to save a complaint from dismissal").

10 **III. CONCLUSION**

11 Despite several attempts, Plaintiffs have not come close to meeting the PSLRA's
 12 exacting pleading requirements for securities fraud. Mr. Wynn accordingly requests that the
 13 Court dismiss the Second Amended Complaint, with prejudice. *See id.* at 1060 n.4 (affirming
 14 dismissal with prejudice where the plaintiff had "multiple opportunities to amend" and was
 15 "unable to cure the defects that required dismissal").

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CERTIFICATE OF SERVICE

I certify that on August 18, 2020, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

/s/ *Colleen C. Smith*
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